IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 117 of 1985

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KRISHNAKESHSAV LABORATORIES LIMITED
Versus
COMMISSIONER OF INCOME-TAX

Appearance:
MR JP SHAH for Petitioner
MR MANISH R BHATT for Respondent No. 1

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE A.R.DAVE

Date of decision: 26/09/2000

ORAL JUDGEMENT (Per A.R.Dave, J)

At the instance of the assessee, the following questions have been referred to this Court for the Assessment year 1978-79 and 1979-80 for its opinion under the provisions of Section 256(1) of the Income Tax Act, 1961 (hereinafter referred to as the "Act").

Questions for the A.Y. 1978-79.

"Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the salary paid to the employees of the appellant for the period during which he was in foreign country should be considered for the purpose of determining the disallowance under sub-section (5) of section 40A of the Income-tax Act, 1961?".

"Whether on facts and in the circumstances of the case, the Appellate Tribunal was right in law in confirming the order of the Commissioner of Income-tax (Appeals) holding that the freight and insurance charges of Rs.1,37,639/- were not eligible for weighted deduction u/s. 35B of the Income-tax Act, 19061?".

Questions for A.Y. 1979-80.

"Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the salary paid to the employees of the appellant for the period during which he was in foreign country should be considered for the purpose of determining the disallowance under sub-section (5) of section 40-A of the Income-tax Act, 1961?".

2. So far as the first question referred to this Court for the assessment year 1978-79 and the question referred to this Court for the assessment year 1979-80 is the same, we answer the said question by a common answer.

3. We have heard Ld. Advocate Mr.J.P.Shah appearing for the assessee and Mr.Akil Qureshi for the Revenue. Ld. Advocates appearing for the parties have submitted that both the questions referred to this Court have been now squarely covered by the judgements delivered by the Honourable Supreme Court and by this Court.

4. So far as the first question is concerned, it pertains to disallowance under sub-section (5) of Section 40A of the Act. The said question has been answered by the Honourable Supreme court in C.I.T. Vs. Continental Construction Ltd reported in (1998) 230 ITR 485. The question pertains to amount of salary paid to a director, who was also an employee of the assessee company, when the said director was outside the country. It has been held by the Supreme Court in the case of C.I.T. Vs. Continental Construction Ltd. (Supra) that when an

employee is given salary in respect of any period of his employment outside India, the amount of salary paid to such an employee would not be subject to disallowance under sub-section (5) of Section 40A. In view of the law laid down by the Honourable Supreme Court, it is clear that the assessee will get deduction of the amount of salary paid to an employee, who was outside India, without suffering from disallowance under the provisions of Section 40A (5) of the Act. Thus, we decide the said question in favour of the assessee and against the Revenue. The Honourable Supreme Court has come to the said conclusion for the reason that provisions of Section 40A(5)(b) provides that nothing in clause (a) would apply to any salary or allowance paid to an employee in respect of his employment outside India. By virtue of said exception provided in Section 40A(5)(b), it is very clear that the amount of salary paid to an employee during his period of employment outside India cannot be disallowed or cannot be subject to the ceiling prescribed under Section 40A(5)(a).

5. So far as the second question is concerned, it is submitted by the Learned Advocates that the said question has also been covered by the judgement delivered in the case of CIT Vs. M.M.Khambhatwala reported in 198 ITR (1992) 144. The assessee had paid freight and insurance charges to the tune of Rs.1,37,639/- in the process of exporting goods and the assessee had claimed weighted deduction under Section 35B of the Act. It has been held in the case of CIT Vs. N.M.Khambhatwala (Supra) that such amount i.e. amount of premium, freight etc. spent by the assessee in the process of exporting goods cannot be considered while calculating the weighted deduction uner Section 35B of the Act. In view of the said judgement, we have to answer this question in favour of the Revenue and against the Assessee.

Thus, we answer no.1 in favour of the assessee and against the Revenue and question no.2 is answered in favour of the Revenue and against the assessee. This Reference thus stands disposed of with no order as to costs.

(D.M.Dharmadhikari, CJ)

(A.R.Dave, J)

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